

Decision 05-01-033 January 13, 2005

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion for the Purpose of  
Considering Policies and Rule Governing  
Utility Construction Contracting Process.

Rulemaking 03-09-006  
(Filed September 4, 2003)

**ORDER MODIFYING AND DENYING REHEARING OF  
DECISION 04-04-038**

**I. SUMMARY**

By this Order, the California Public Utilities Commission (Commission) grants the request in the Application for Rehearing of Decision (D.) 04-04-038 (Decision) filed by AT&T Wireless Services of California, LLC, Pacific Bell Wireless, LLC d/b/a Cingular Wireless, Nextel of California, Inc., Sprint Spectrum L.P. d/b/a/ Sprint, Omnipoint Communications, Inc. d/b/a T-Mobile, and Verizon Wireless (collectively "Wireless Carriers"), to excuse all wireless carriers from Rulemaking (R.) 03-09-006. As modified herein, rehearing of D.04-04-038 is denied.

**II. BACKGROUND**

The Decision resolved petitions to modify R.03-09-006 and motions that sought to change the named respondents to this proceeding. D.04-04-038 also granted motions for confidentiality filed by several utilities. The Commission initiated this proceeding on September 3, 2003, when it issued an Order Instituting Rulemaking (OIR).

The OIR ordered all respondent utilities, including wireless carriers, to file a report regarding construction contract practices by October 24, 2003.<sup>1</sup> On October 16, 2003, Wireless Carriers filed a Joint Motion to exclude all wireless carriers from the scope of the OIR, arguing that the Commission lacked jurisdiction over wireless carrier contracting practices. On January 30, 2004, Wireless Carriers filed a supplement to the Joint Motion to show the extreme burden associated with providing the information requested by the OIR. No party opposed or commented on any portion of the Joint Motion or its Supplement.

On February 24, 2004, the Commission issued a proposed decision (PD) to resolve, among other things, the Joint Motion. On March 15, 2004, Wireless Carriers filed comments to the PD addressing an inconsistency between Conclusion of Law 2 and Ordering Paragraph 1 of the PD. Conclusion of Law 2 excludes all wireless carriers from the proceeding. Ordering Paragraph 1, however, does not separately exclude all wireless carriers, but rather, excludes all utilities with annual California revenues of less than 500 million dollars. Findings of Fact 1 and 2 of the Decision are consistent with Ordering Paragraph 1. On April 22, 2004, the Commission issued a revised PD that acknowledged the comments filed by Wireless Carriers, but did not eliminate the inconsistency noted by Wireless Carriers. The Commission adopted the revised PD on April 22, 2004 and issued D.04-04-036 on April 26, 2004.

Wireless Carriers timely filed an application for rehearing on May 26, 2004. In their application for rehearing, Wireless Carriers argue that: (1) D.04-04-038 is erroneous because there is an inconsistency as to whether it excuses all wireless carriers from the proceeding, or whether it excuses from the proceeding only a subset of wireless carriers

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<sup>1</sup> The OIR provides, in relevant part: “We have two goals in this rulemaking. First, we seek to develop an understanding of the construction contracting processes of the electric, natural gas, telecommunication and water utilities – the criteria by which utilities’ contract awards are based, the overall magnitude of the utilities’ annual construction contracts granted, the processes used by utilities to solicit and award construction contracts, and their policies regarding the execution of primary contracts and subcontractor agreements. Second, we will consider adopting rules to ensure that utility construction contracting practices are consistent with rules governing state and federal public works contracting practices. We seek comment on both of these issues.” (OIR, p. 1.)

with annual California revenues of less than \$500 million; and (2) if the Commission intended to exclude only a subset of wireless carriers from this proceeding, then the Commission committed legal error because (a) the exclusion of a subset of wireless carriers is arbitrary and capricious and without rational basis; (b) D.04-04-038 lacks any material findings of fact or conclusions of law that would support the inclusion of any wireless carrier in this proceeding; and (c) D.04-04-038 lacks any material findings of fact or conclusions of law that would support the Commission's exercise of jurisdiction over wireless carriers in this proceeding.

### III. DISCUSSION

#### A. Inconsistency Within the Decision.

Wireless Carriers contend that the Decision is internally inconsistent with respect to whether it excuses all wireless carriers from this proceeding,<sup>2</sup> or whether it excuses only wireless carriers with annual California revenue of less than \$500 million.<sup>3</sup> (App. For Rehearing, p. 2.) On rehearing, we note that Wireless Carriers are correct in alleging that the Decision is inconsistent. We agree that all wireless carriers should be excluded from this proceeding.

Although the language in the Decision may have left the impression that we did not wish to exclude all wireless carriers from this OIR, we now believe that was the logical conclusion based on the facts in the record. There is no evidence in the record to demonstrate that the subjects of inquiry in this OIR, reverse auction bidding or bid shopping, have ever presented a problem in the wireless construction contracting process. Therefore, unless additional information comes to our attention, we find that it is not necessary at this time to require wireless carriers to be respondents to this proceeding.

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<sup>2</sup> Conclusion of Law 2 in the Decision states: "R.03-09-006 should be modified to excuse the following types of utilities from the obligations of respondents: *wireless carriers*; water utilities designated as Class B, C, or D, and utilities with annual California revenues less than \$500 million, except for independent storage providers." (D.04-04-038, *mimeo*, p. 8 (emphasis added).)

<sup>3</sup> Ordering Paragraph 1 states: "The following jurisdictional utilities are excused from obligations as respondents to this proceeding: all water utilizes designated as Class B, C, or D, and all utilities except independent storage providers with annual California revenues less than \$500 million." (D.04-04-038, *mimeo*, p. 9.)

To resolve the inconsistency presented in D.04-04-038, we will amend the body of the Decision at pages 4-5 and 6 and Ordering Paragraph 1 to make clear the Commission's intent to excuse all wireless carriers from this proceeding. We will also add Finding of Fact 4 to clarify our intent. Because we are granting Wireless Carriers' request to excuse them from this OIR, we do not address Wireless Carriers' other claims of legal error. In particular, we do not address the issue of the Commission's jurisdiction over Wireless Carriers in this order. To the extent that D.04-04-038 can be interpreted to assert such jurisdiction, we clarify that it was not our intent to assert jurisdiction over Wireless Carriers in D.04-04-048 because it is unnecessary given our decision on rehearing to exempt wireless carriers from this OIR.

#### IV. CONCLUSION

Since we have determined to excuse all wireless carriers from this OIR, we do not need to address Wireless Carriers' claims of legal error. D.04-04-038 is modified as shown below to amend language on pages 4-5 and 6 of D.04-04-038 and Ordering Paragraph 1, and to add Finding of Fact 4.

Therefore **IT IS ORDERED** that:

1. Delete the following paragraph beginning on page 4, *mimeo*, of D.04-04-038, starting at line 8 of the second full paragraph:

“In the case of the respective motions of CWA, wireless carriers, Mountain Utilities and the small telephone utilities, the larger utilities in each of those industries should provide adequate information. We therefore excuse most of the smaller utilities as respondents from this proceeding at this time.”

and replace it with the following revised language:

“In the case of the respective motions of CWA, Mountain Utilities, and the small telephone utilities, the larger utilities in each of those industries should provide adequate information. We therefore excuse most of the smaller utilities as respondents from this proceeding at this time. We also excuse all wireless carriers as respondents from this proceeding because we do not believe that their participation

will yield any new information concerning utility construction contracting practices.”

2. Delete the following paragraph in D.04-04-038, *mimeo*, beginning on page 6, starting with the first line of the second full paragraph:

“With these clarifications, we grant the petitions and motions of Wireless Carriers, Mountain Utilities, CWA and small telephone companies to remove them as respondents to this proceeding to the extent we herein excuse all utilities with annual California revenues less than \$500 million.”

and replace it with the following revised language:

“With these clarifications, we grant the petitions and motions of Mountain Utilities, CWA and small telephone companies to remove them as respondents to this proceeding to the extent we herein excuse all utilities with annual California revenues less than \$500 million. We also grant the motion of Wireless Carriers to remove all wireless carriers as respondents to this proceeding.”

3. Add the following Finding of Fact 4 on page 8, *mimeo*, of D.04-04-038:

“There is no evidence in the record demonstrating that reverse auction bidding or bid shopping have presented a problem in the wireless construction contracting process.”

4. Delete the following Ordering Paragraph 1 on page 10, *mimeo*, of D.04-04-038:

“The following jurisdictional utilities are excused from obligations as respondents to this proceeding: all water utilities designated as Class B, C, or D, and all utilities except independent storage providers with annual California revenues less than \$500 million.”

and replace it with the following revised Ordering Paragraph 1:

“The following jurisdictional utilities are excused from obligations as respondents to this proceeding: all wireless carriers, all water utilities designated as Class B, C, or D, and all utilities except independent storage providers with annual California revenues less than \$500 million.”

5. Rehearing of D.04-04-038, as modified herein, is denied.

This order is effective today.

Dated January 13, 2005, at San Francisco, California.

MICHAEL R. PEEVEY  
President

GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners